

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

DR. WILLIAM S. ROSS and CYNTHIA ROSS

PLAINTIFFS

V.

CIVIL ACTION NO.1:07CV521 LTS-RHW

METROPOLITAN PROPERTY and CASUALTY
INSURANCE COMPANY, ET AL.

DEFENDANTS

MEMORANDUM OPINION and ORDER

The Court has before it the motion [125] of plaintiffs *in limine* to exclude from the trial of this matter any reference to an expert report prepared at the request of plaintiffs' former counsel. The report was written by Stephen Harned (Harned), and it has been listed on the plaintiffs' privilege log. Plaintiffs have not identified Harned as a witness who may be called to testify at trial.

None of the plaintiffs' other experts have relied upon Harned's report, although in his deposition Ted Biddy (Biddy) was asked about Harned's report. Biddy testified that Harned had calculated a wind speed of 109 miles per hour (in what context is not disclosed) and that he (Biddy) had used that wind speed as a basis for some unspecified calculations. (Biddy Deposition at pages 100 -101)

The report and the opinion of a non-testifying expert witness is hearsay, and such a report is fair grounds for cross-examination of an expert only when the expert relies on or bases his opinion on the report or opinion of the non-expert. *Polythane Systems, Inc., v. Marina Ventures Intern.*, 993 F.2d 1201 (5th Cir. 1993); *Bryan v. John Bean Div. Of FMC Corp.*, 566 F.2d 541 (5th Cir.1978). Defense counsel will be free to examine Biddy concerning his calculation based on a wind speed of 109 miles per hour (or any other wind speed), but I will not allow the defendant to import Harned's report through the back door by specifically referring to the report at trial.

Accordingly, **IT IS ORDERED:**

Plaintiffs' [125] Motion *in limine* concerning the report of a non-testifying expert witness is **GRANTED**, subject to the comments above.

SO ORDERED this 16th day of October, 2008.

s/ L. T. Senter, Jr.
L. T. SENTER, JR.
SENIOR JUDGE